

***DISTRICT OF MAINE***

***Docket No. 03-255-P-H***

jurisdiction, governed by this rule, raises the question whether a defendant has “purposefully established minimum contacts in the forum State.” *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing suffices. *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff’s pleadings. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true. *Id.*

The complaint includes the following relevant factual allegations. Gaffney is a resident of Massachusetts who at all relevant times was acting as an agent of Guardian.<sup>1</sup> Complaint (Attachment 4 to State Court Record (Docket No. 5)) ¶¶ 3-4. Gaffney handled all matters relating to a disability insurance policy issued to the plaintiff by Guardian. *Id.* ¶¶ 5-6. The plaintiff closed his dental office in Massachusetts in the late summer of 2000 and moved to Maine. *Id.* ¶¶ 7-9. He kept his post office box in Massachusetts until the end of October 2000. *Id.* ¶ 7. He called Gaffney from Maine and gave Gaffney his new address and telephone number and asked for an appointment to discuss increasing his disability insurance. *Id.* ¶ 9. Gaffney informed the plaintiff that he was in the process of moving but would follow up on the plaintiff’s inquiry at a more convenient time. *Id.* ¶ 10. Gaffney never contacted the plaintiff again. *Id.* ¶ 11. Guardian sent a quarterly bill for the premium on this insurance to the plaintiff’s Massachusetts address in December 2000; it was returned to Guardian because the post office box had been closed. *Id.* ¶ 12. The plaintiff

---

<sup>1</sup> The complaint names Berkshire Life Insurance Company as a defendant. Complaint ¶ 2. Guardian, successor in interest  
(continued on next page)

never received notification that the bill had been returned as undeliverable. *Id.* ¶ 15. Guardian canceled the policy for non-payment of premiums on or about March 28, 2001. *Id.* ¶ 17. On or about October 27, 2001 the plaintiff was injured and subsequently became totally disabled. *Id.* ¶ 18. The plaintiff contacted Guardian and discovered that his disability insurance policy had been canceled. *Id.* ¶ 21.

In order to show that this court may exercise personal jurisdiction over Gaffney, the plaintiff must make a *prima facie* showing of jurisdiction by “citing to specific evidence in the record that, if credited, is enough to support findings of all facts essential to personal jurisdiction.” *New Life Brokerage Servs., Inc. v. Cal-Surance Assocs., Inc.*, 222 F.Supp.2d 94, 97 (D. Me. 2002) (citation and internal quotation marks omitted). When no evidentiary hearing is held,

the plaintiff must make the showing as to every fact required to satisfy both the forum’s long-arm statute and the due process clause of the Constitution. In so doing, the plaintiff must make affirmative proof beyond the pleadings. When determining whether the plaintiff has made the requisite *prima facie* showing, the court considers the pleadings, affidavits, and exhibits filed by the parties. For the purposes of such a review, plaintiff’s properly supported proffers of evidence are accepted as true and disputed facts are viewed in a light favorable to the plaintiff[;] however[,] unsupported allegations in the pleadings need not be credited.

*Id.* (citations and internal quotation marks omitted).

The plaintiff does not appear to contend that this court has general personal jurisdiction over Gaffney; such jurisdiction arises when a defendant has continuous and systematic general business contacts with the forum state. *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 619 (1st Cir. 2001). In this case, the plaintiff relies on contacts that cannot reasonably be described as continuous and systematic. Opposition of Plaintiff to Defendant Gaffney’s Motion to Dismiss, etc. (“Dismissal Opposition”) (Docket

---

to Berkshire Life Insurance Company, was substituted as a named defendant upon motion of the plaintiff. Docket Nos. (continued on next page)

No. 29) at 6-7. The issue must accordingly be analyzed on the basis of specific personal jurisdiction, which has three elements.

First, an inquiring court must ask whether the claim that undergirds the litigation directly relates to or arises out of the defendant's contacts with the forum. Second, the court must ask whether those contacts constitute purposeful availment of the benefits and protections afforded by the forum's laws. Third, if the proponent's case clears the first two hurdles, the court then must analyze the overall reasonableness of an exercise of jurisdiction in light of a variety of pertinent factors that touch upon the fundamental fairness of an exercise of jurisdiction.

*Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999).

Gaffney states that he has lived and worked in Massachusetts at all times. Declaration of Christopher Gaffney (Docket No. 34) ¶ 4. He is not and never has been licensed as an insurance broker or agent in Maine. *Id.* ¶ 5. He does not transact business in Maine and has not had clients or customers who reside in Maine. *Id.* ¶ 6. He has not solicited business in Maine. *Id.* ¶ 7. He was not in charge of mailing notices, receiving payments or otherwise keeping track of policyholders' accounts, addresses or claims. *Id.* ¶ 8. He had not derived any income from sources in Maine, owns no property in Maine and has never resided or worked in Maine. *Id.* ¶ 9.

The plaintiff contends that he "believed that the Defendant Gaffney did business in Maine based on the telephone call where the issue of increasing additional coverage was discussed." Dismissal Opposition at 6. He "agrees" that the single telephone call mentioned in his complaint would not provide sufficient basis for this court to exercise personal jurisdiction over Gaffney, *id.*, but argues that "[j]urisdictional discovery in this case may yet confirm that this Court has personal jurisdiction over the Defendant Gaffney," *id.* at 7. He argues that "[a] substantial part of the events in this case took place in Maine," listing his reliance on the

---

21, 23.

“representation” made by Gaffney during the telephone call, which he alleges resulted in damage in Maine and created a “continuing obligation with the expectation of conducting future business in Maine,” *id.*, and “at least one telephone call to Maine in response to an inquiry from his insurance client,” *id.* at 8. He also relies on a “demand for relief . . . directed to both Defendants [that] originated in Maine.” *Id.* His affidavit says that during the telephone call mentioned in the complaint, Gaffney “informed my wife that he was moving, that the moving van was in front of his house at that moment, but that he would follow up on this inquiry and call my wife or me back at a more convenient time.” Declaration of Plaintiff in Opposition to Defendant Gaffney’s Motion to Dismiss, etc. (“Plaintiff’s Aff.”) (Docket No. 30) ¶ 7. The second telephone call mentioned in the plaintiff’s opposition is described as follows: at some time after November 16, 2001 “[w]hen Jean Cimon finally had a telephone number where she understood she could call the Defendant Gaffney, she called and left a message for him to call back. The Defendant Gaffney made a return call and left a message on the answering machine. Jean Cimon ultimately was never able to speak with the Defendant Gaffney.” *Id.* ¶ 14. The affidavit states that Jean Cimon sent Gaffney a letter dated November 26, 2001 and that the plaintiff “gave notice” to Gaffney that he wanted the policy reinstated by a letter dated November 27, 2001. *Id.* ¶¶ 15, 17.

The plaintiff claims that Gaffney negligently breached certain duties of care, Complaint ¶ 23; violated Chapter 93A, Section 2<sup>2</sup> and Chapter 176D, Section 3(9)<sup>3</sup> of the Massachusetts General Laws, *id.* ¶ 28; is equitably estopped to deny him relief, *id.* ¶¶ 33-36; and breached a contract with the plaintiff, *id.* ¶¶ 38-40.

---

<sup>2</sup> That statute provides, in relevant part: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” Mass. Gen. Laws Ann. ch. 93A, § 2(a).

<sup>3</sup> That statute provides that unfair claim settlement practices, which it defines, constitute unfair methods of competition and unfair or deceptive acts or practices in the business of insurance. Mass. Gen. Laws Ann. ch. 176D, § 3(9). None of the unfair claim settlement practices defined in the statute appear to apply to an agent or broker, as opposed to the insurer itself.

None of these claims arises out of or directly relates to Gaffney's telephone call leaving a message on the plaintiff's answering machine after he was injured. Nor may a plaintiff establish personal jurisdiction over a nonresident defendant by his own unilateral act of sending correspondence to that defendant from within the jurisdiction. *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996) (defendant's contact with forum state must be voluntary, not based on unilateral actions of another party). None of the claims could reasonably arise out of or directly relate to the first telephone call, but the reason for this conclusion with respect to the first claim requires separate treatment.

Gaffney's alleged statement — that he was moving, but that he would follow up on the plaintiff's inquiry and call him back at a more convenient time — cannot reasonably be construed to undergird Count I. The inquiry was a request to discuss increasing the amount of coverage. Plaintiff's Aff. ¶ 6. The complaint does not allege any injury arising out of the lack of an increase in the amount of coverage under the policy; it alleges injury arising out of the cancellation of the policy. The plaintiff alleges that Gaffney was provided with his new address during that telephone call; his injury arises out of Gaffney's alleged failure to convey the change to Guardian. That failure occurred in Massachusetts, if it occurred at all. The fact that the plaintiff or his wife placed the call to Gaffney, along with the substance of his reported statements, also makes clear that the call did not constitute purposeful availment by Gaffney of the benefits and protections afforded by Maine laws. In addition, the fact that the results of Gaffney's alleged omissions were felt in Maine is not enough to constitute minimum contacts. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 36 (1st Cir. 1998). The plaintiff has failed to establish the first two elements of the test for personal jurisdiction and Gaffney accordingly is entitled to dismissal. *See generally Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 289-91 (1st Cir. 1999); *Sawtelle v. Farrell*, 70 F.3d 1381, 1389-93 (1st Cir. 1995).

## **II. The Motion to Allow Discovery**

The plaintiff contends that he is entitled to discovery on the question of this court's exercise of personal jurisdiction over Gaffney before the court addresses the motion to dismiss because he "is unfamiliar with the business practices of the Defendant Gaffney and would need discovery in order to determine whether or not the Defendant Gaffney, in fact, had done business in the State of Maine, had been licensed to provide insurance in the State of Maine, had written policies for Maine residents, etc." Plaintiff's Motion to Allow Jurisdictional Discovery, etc. (Docket No. 28) at 6. Both Gaffney and Guardian have filed memoranda in opposition to this motion. Defendant Gaffney's Opposition to Plaintiff's Motion to Allow Jurisdictional Discovery (Docket No. 33); Defendant Guardian's Opposition to Plaintiff's Motion to Allow Jurisdictional Discovery (Docket No. 35). Gaffney has already provided his sworn statement that he has not done any business in Maine and has not been licensed to provide insurance in Maine.

In his reply memorandum, the plaintiff reverts to reliance on the substance of Jean Cimon's reported telephone conversation with Gaffney. Plaintiff's Reply Memorandum in Support of Plaintiff's Motion to Allow Jurisdictional Discovery (Docket No. 36) at. 2. He proposes to inquire of Gaffney about "the basis on which he made the . . . statements which led the Plaintiff to the not unreasonable assumption that the Defendant Gaffney could do business in the State of Maine." *Id.* However, it is what the plaintiff contends that Gaffney did *not* say during that telephone conversation that he asserts led him to this assumption. *Id.* Contrary to the plaintiff's assertion, it is not clear based on what Gaffney is reported to have said that he contemplated a future business relationship with the plaintiff "and a continuing sale of disability insurance policies." *Id.* That is not a reasonable inference to draw from Gaffney's reported statement that he would

“follow up” on a request to discuss increasing the limits of the plaintiff’s existing insurance policy. No suggestion may reasonably be read into that statement that Gaffney “believed he could do business in the State of Maine” and “lead Jean Cimon to believe he could sell disability insurance in Maine to a Maine resident.” *Id.* Even if it could, however, the act of leading the plaintiff’s wife to believe those things does not undergird the claims set forth in the complaint.

The plaintiff has not shown that the discovery he requests is likely to generate additional facts relevant to the exercise of personal jurisdiction over Gaffney by this court. His motion to allow discovery on this issue is denied.

### **III. The Motion to Transfer**

As an alternative, the plaintiff asks this court to transfer this case to the District of Massachusetts under 28 U.S.C. §§ 1406(a) and 1631 rather than dismissing his claims against Gaffney for lack of personal jurisdiction. Dismissal Opposition at 13-15. Venue would be proper in that district because both defendants appear to be residents of Massachusetts. Complaint ¶¶ 2-3. However, there is no suggestion in the record that venue or jurisdiction in this court is improper as to Guardian.<sup>4</sup> *See generally United States v. County of Cook, Illinois*, 170 F.3d 1084, 1087-89 (Fed. Cir. 1999) (discussing whether transfer of fewer than all claims is appropriate under § 1361). Both statutes invoked by the plaintiff allow for transfers “in the interest of justice.” In light of my recommendation that Guardian’s motion for summary judgment be granted, as discussed below, I conclude that the transfer sought by the plaintiff would not be in the interests

---

<sup>4</sup> The plaintiff contends that Guardian “may, in the future, contest jurisdiction” because it “has not filed an Answer.” Plaintiff’s Reply Memorandum in Support of Plaintiff’s Motion to Transfer, etc. (Docket No. 37) at 1-2. To the contrary, Guardian’s predecessor in interest, Berkshire Life Insurance Company, filed an answer in this action on October 30, 2003 (Docket No. 4), by which Guardian is bound, and Guardian may not now contest this court’s personal jurisdiction over it, Fed. R. Civ. P. 12(b). *See also Steward v. Up North Plastics, Inc.*, 177 F.Supp.2d 953, 958 (D.Minn. 2001) (motion under § 1406 must be made in answer or by motion before answer; filing of motion for summary judgment also establishes waiver).

of justice. *See, e.g., Danko v. Director, Office of Workers' Comp. Programs*, 846 F.2d 366, 368-69 (6th Cir. 1988) (where appeal was untimely filed, transfer under § 1361 not in interests of justice). Accordingly, I recommend that the motion be denied.

#### **IV. Motion for Summary Judgment**

##### **A. Summary Judgment Standard**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come

forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

## **B. Factual Background**

The statements of material facts filed by Guardian and the plaintiff pursuant to this court’s Local Rule 56 include the following undisputed material facts.

On or about June 28, 1993 Berkshire Life Insurance Company issued to the plaintiff disability insurance policy number HO320788 (“the Policy”). Statement of Material Facts of Defendant The Guardian Life Insurance Company of America, etc. (“Guardian SMF”) (Docket No. 7) ¶ 1; Plaintiff’s Response to Statement of Material Facts of Defendant, The Guardian Life Insurance Company of America, etc. (“Plaintiff’s Responsive SMF”) (Docket No. 16) ¶ 1. The Policy required premiums to be paid at the defendant’s home office or to any authorized agent on the first day of each premium term. *Id.* ¶ 3. The Policy stated that, if premiums were not paid, the Policy would not continue beyond a 31-day grace period. *Id.* ¶ 4. The Policy was non-cancelable and guaranteed renewable until the plaintiff reached age 65, provided that he continued to pay timely premiums. *Id.* ¶ 5. The plaintiff’s premium was due quarterly. *Id.* ¶ 6.

A premium on the Policy was due on December 28, 2000. *Id.* ¶ 7. The plaintiff did not offer payment of the premium that became due on December 28, 2000 until November 27, 2001. *Id.* ¶ 8. On November 27, 2001 the plaintiff wrote to the defendant requesting reinstatement of the Policy. *Id.* ¶ 9. With his letter the plaintiff tendered a check for the “total premium” due. *Id.* ¶ 10. The defendant refused to accept tender of the check and returned it to the plaintiff. *Id.* ¶ 11. The plaintiff filed suit in the Maine Superior Court (Knox County) not before October 1, 2003. *Id.* ¶ 12.

Guardian claims that on or about November 29, 2000 Berkshire sent the plaintiff a notice of quarterly premium payment due on December 28, 2000. [Plaintiff's] Opposing Statement of Material Facts ("Plaintiff's SMF") (included in Plaintiff's Responsive SMF, starting at 2) ¶ 19; Defendant The Guardian Life Insurance Company of America's Reply to Plaintiff's Opposing Statement of Material Facts ("Guardian's Responsive SMF") (Docket No. 27) ¶ 19. The plaintiff never received this notice. *Id.* ¶ 20. Guardian claims that Berkshire sent the plaintiff a late payment offer on or about January 28, 2001, which the plaintiff never received. *Id.* ¶ 21. Guardian claims that Berkshire sent the plaintiff a lapse notice on or about March 6, 2001, which he never received. *Id.* ¶ 22. The plaintiff first knew about any problem with the payment of his premiums on November 16, 2001. *Id.* ¶ 24.

### **C. Discussion**

The parties agree that Massachusetts law governs this action. Defendant's Motion for Summary Judgment, etc. ("Summary Judgment Motion") (Docket No. 6) at 1 n.1; Memorandum of Plaintiff in Opposition to Motion for Summary Judgment, etc. ("Summary Judgment Opposition") (Docket No. 15) at 1. The complaint asserts claims against Guardian for negligence, violation of Chapters 93A and 176D of the Massachusetts General Laws, equitable estoppel and breach of contract. Complaint. Guardian contends that all of these claims are time-barred by section 110B of chapter 175 of the Massachusetts General Laws or, in the alternative, that the policy was terminated by operation of law when the premium was not paid within three months following the due date. Summary Judgment Motion at 2. The plaintiff responds that the statute of limitations on his contract claim did not begin to run until he discovered that the policy had lapsed and that the statutory limitation on which Guardian relies does not apply to his other claims. Summary Judgment Opposition at 4-9. He does not respond to Guardian's alternative argument.

The Massachusetts statute on which Guardian relies provides as follows, in relevant part:

No policy of insurance . . . , except a policy which by its terms is cancellable by the company or is renewable or continuable with its consent, or except a policy the premiums for which are payable monthly or at shorter intervals, shall terminate or lapse for nonpayment of any premium until the expiration of three months from the due date of such premium, unless the company within not less than ten nor more than forth-five days prior to said due date, shall have mailed, postage prepaid, duly addressed to the insured at his last address shown by the company's records, . . . a notice showing the amount of such premium and its due date. Such notice shall also contain a statement as to the lapse of the policy if no payment is made as provided in the policy. If such a notice is not so sent, the premium in default may be paid at any time within said period of three months. The affidavit of any officer, clerk or agent of the company, or of any other person authorized to mail such notice, that the notice required by this section has been duly mailed by the company in the manner hereinbefore required, shall be prima facie evidence that such notice was duly given. No action shall be maintained on any policy to which this section applies and which has lapsed for nonpayment of any premium unless such action is commenced within two years from the due date of such premium.

Mass. Gen. Laws Ann. ch. 175 § 110B. Guardian's first argument is based on the last sentence of this statute; its alternative argument is based on the first sentence.

The first sentence of section 110B means that an insurance policy that is not cancellable by the issuing company, as is the case here, Guardian SMF ¶ 5; Plaintiff's Responsive SMF ¶ 5, terminates automatically, without notice to the insured, "[i]f . . . the outstanding payment is still unpaid three months from the due date of the premium," *Gaffney v. AAA Life Ins. Co.*, 4 F.Supp.2d 38, 39 (D. Mass. 1998). That is the case here. Guardian SMF ¶¶ 7-8; Plaintiff's Responsive SMF ¶¶ 7-8. The plaintiff's argument that he is entitled to the benefit of a discovery rule due to Guardian's failure to ensure that its premium bill, late payment offer and notice of lapse reached him at his new address, Summary Judgment Opposition at 5-7, is therefore irrelevant. Guardian is entitled to summary judgment on the claims for breach of contract and violation of chapters 93A and 176D (Counts II and IV). *Gaffney*, 4 F.Supp.2d at 40. Similarly, the plaintiff's claims for negligence in failing to send bills and notices to the plaintiff's new address, record his

new address, “follow established procedures at the returned mail unit, . . . use reasonable measures to obtain an accurate address” for the plaintiff, obtain the plaintiff’s new address from agent Gaffney and obtain an address for the plaintiff “once the Defendants have undertaken a search to locate the Plaintiff,” Complaint ¶ 23 (Count I), are foreclosed by the fact that the policy terminated by law without any requirement of notice to the plaintiff. Finally, the plaintiff cannot make an end run around section 110B by claiming that Guardian is equitably estopped to rely on the plain language of the statute (Count III). The fact that each of the claims other than that for breach of contract might arguably have a different statute of limitations than that imposed by the second sentence of section 110B, as the plaintiff contends, Summary Judgment Opposition at 8-9, is irrelevant because those claims arise out of the alleged failure to notify the plaintiff that he had not paid his quarterly premium when due, as he had been doing for seven years, and are not independent of the policy which terminated by law regardless of the lack of notice.

The plaintiff relies on *Pierce v. Massachusetts Acc. Co.*, 22 N.E.2d 78 (Mass. 1939), *id.* at 5, to support his contention that the failure to notify him that his premium payment was due when he had become accustomed to paying on receipt of such notices should not bar his claim for benefits under the policy when he in fact did not pay the premium. That case was decided on July 7, 1939, shortly after section 110B was first enacted on May 15, 1939, Mass. Gen. Laws Ann. Ch. 175, § 110B, Historical and Statutory Notes, and does not mention the statute. For that reason alone, the decision cannot provide a basis for ignoring the clear, unambiguous language of the statute and the more recent case law interpreting it. In addition, the insurance company in *Pierce* had deliberately failed to send a premium bill to the plaintiff in hopes that he would not send a payment so that it could cancel the policy, which led the court to apply equitable principles in favor of the plaintiff. *Pierce*, 22 N.E.2d at 80. There is no evidence that Guardian employed a similar “stratagem” in this case. None of the other Massachusetts case law cited by the plaintiff concerns a

situation in which failure to pay a premium more than three months after it was due caused termination of the policy under section 110B.

## V. Conclusion

For the foregoing reasons, (i) the plaintiff's motion to allow jurisdictional discovery is **DENIED**; (ii) I recommend that the motion of defendant Gaffney to dismiss all claims asserted against him be **GRANTED**; (iii) I recommend that the plaintiff's motion to transfer this action to the District of Massachusetts be **DENIED**; and (iv) I recommend that the motion of defendant Guardian for summary judgment be **GRANTED**.

## NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 11th day of March, 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

Plaintiff

-----

RALPH J CIMON, III

represented by C. DONALD BRIGGS, III

BRIGGS & COUNSEL  
815 COMMERCIAL STREET  
ROCKPORT, ME 04856-4243  
(207) 596-1099  
Email: dbriggs@dbriggslaw.com

V.

**Defendant**

-----

**BERKSHIRE LIFE INSURANCE  
COMPANY**  
*TERMINATED: 12/23/2003*

represented by **GERALDINE G. SANCHEZ**  
PIERCE, ATWOOD  
ONE MONUMENT SQUARE  
PORTLAND, ME 04101-1110  
791-1100  
Email: gsanchez@pierceatwood.com

**CHRISTOPHER GAFFNEY**

represented by **RUSSELL PIERCE**  
NORMAN, HANSON & DETROY  
415 CONGRESS STREET  
P. O. BOX 4600 DTS  
PORTLAND, ME 04112  
774-7000  
Email: rpierce@nhdlaw.com